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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1975

74-954

THE UNITED STATES OF AMERICA)
ex rel HENRY R. COBELL,
Respondent,)

v.)

THE HONORABLE JOHN P. SHARP)
AND THE BLACKFEET TRIBAL
COURT,)
Petitioners.
)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN T. McDERMOTT
Director
Indian Law Program
University of Montana
School of Law
Missoula, Montana 59801

Counsel for Petitioners

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The honorable John P. Sharp and the Blackfeet Tribal Court respectfully petition that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on September 5, 1974.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, filed on September 5, 1974, is printed as Appendix A hereto and is reported at 503 F.2d 790 (1974).

The Memorandum Opinion, Order and Judgment of the United States District Court for the District of Montana, filed on December 15, 1972, denying respondent's motion for reconsideration, is printed as Appendix B hereto.

The Memorandum Opinion and Order of the United States District Court for the District of Montana, filed on December 6, 1972, is printed as Appendix C hereto.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered judgment in this case on September 5, 1974. On November 4, 1974, the Court of Appeals entered

its order granting respondent-appellant's motion for extension of time for filing a petition for rehearing, and also on November 4, 1974 entered its order denying the petition for rehearing.

The jurisdiction of this Court is invoked under Title 28 U.S.C. sections 1254(1) and 2101(c), and under Rule 22(3), Supreme Court Rules.

QUESTIONS PRESENTED

(1) Whether a person aggrieved by an order of an Indian tribal court must exhaust available tribal court remedies before seeking a writ of habeas corpus from a United States District Court pursuant to 25 U.S.C. § 1303 ?

(2) Whether Indian tribal courts must give full faith and credit to state court judgments where the state courts do not recognize judgments rendered by

Indian tribal courts?

(3) Whether the Blackfeet Indian Nation, by tribal ordinance and without complying with applicable provisions of P.L. 280 and the Indian Civil Rights Act, could transfer jurisdiction over marriage, divorce, and related matter to courts of the state of Montana, thereby leaving the Blackfeet Tribal Court without jurisdiction to render a decree affecting the custody of children of divorced tribal members?

(4) Whether the Blackfeet Tribal Court could assume jurisdiction over Blackfeet Indian children found on the Blackfeet Indian Reservation and, having determined that the welfare of the children was in jeopardy, enter a temporary decree inconsistent with an outstanding interlocutory state court decree concerning the custody of the children.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of Article I, Section 8 of the Constitution of the United States, of the Wheeler-Howard Act (48 Stat. 984), of Public Law 280 (67 Stat. 588), of the 1968 Civil Rights Act (82 Stat. 77), of the Blackfeet Tribal Constitution, and of the Law and Order Code of the Blackfeet Tribe are set forth in Appendix D hereto.

STATEMENT OF THE CASE

The basic issue in this case is the legality of an order of the Blackfeet Tribal Court, asserting control over two Blackfeet Indian children in contravention of a temporary state court order.

Joan and Henry Cobell are both enrolled members of the Blackfeet Indian Tribe. Married on October 17, 1963 on the Blood Indian Reserve in Alberta,

Canada, they subsequently had two children, Rodney and Venetta. Both are minors, and although they possess a substantial amount of Indian blood neither is eligible for enrollment in the Blackfeet Tribe.

In August of 1971, Joan Cobell filed for divorce in the state district court in Great Falls, Montana. Henry counterclaimed and a decree was entered on December 22, 1971 giving custody of the minor children to Henry. Actual custody of the children was apparently surrendered to Henry soon thereafter. Then in August, 1972, Joan petitioned the State District Court for a modification of the December 22nd decree. A Temporary Order was entered on August 4, 1972 granting custody of the children to Joan until such time as a hearing could be held. On

August 14, 1972, a hearing was held and the court thereafter granted permanent custody to Joan. Under the authority of this order, she took the children to her home on the Blackfeet Indian Reservation. Following an appeal to the Montana Supreme Court, the State District Court on September 26, 1972 vacated its August Order and granted temporary custody of the children to Henry. In spite of this order, the children remained on the Blackfeet Indian Reservation in the custody of Joan Cobell.

On October 6, 1972, Leona Conway, the children's maternal grandmother, petitioned the Blackfeet Tribal Court to take custody of the children. Finding that the two young children were "without adequate supervision" and were "suffering emotionally and pyschologically because of the uncertainty of the custody and adult supervision," the Tribal Court

entered a temporary ex parte order on the same day placing the children "under the care, custody and control of this court." The order further provided that the two children could not be removed from the reservation without further order of the Tribal Court. This order was by its terms clearly temporary, lasting only until a final determination upon the question of custody was made by the state court. The order plainly indicates that the tribal court would enforce such a final state court decree provided that it was satisfied that the custody provisions were for the best interests of the children. A copy of this order was sent to Henry Cobell at his last known address.

Rather than seeking relief from the Tribal Court order either by moving to vacate the order on any of the grounds

subsequently raised in the federal habeas proceeding or by appealing the trial court's order to the Blackfeet appellate court, Henry filed a petition for a writ of habeas corpus in the United States District Court for the District of Montana. Jurisdiction in this court was based on Title 25 U.S.C. §1303.

On December 6, 1972, the District Court granted the petition. Appellants Blackfeet Tribal Court and Chief Judge John Sharp filed a motion for reconsideration which was denied by the District Court's order of December 15, 1972.

Leona Conway, the Blackfeet Tribal Court, and Judge Sharp filed notices of appeal from the orders of December 6 and December 15 granting the writ of habeas corpus. Separate appeals were perfected and were consolidated by stipulation. The

district court stayed its order seven days to permit appellants to make application to the United States Court of Appeals for the Ninth Circuit for a stay pending appeal. The stay was continued by a single judge of the Court of Appeals until January 2, 1973. On January 3, 1973, the Court of Appeals dissolved the stay on the grounds "that the best interests of the children will not be served by staying the decision of the United States District Court." Although the order was not received by the Blackfeet Tribal Court for nearly a week, the Tribal Court on the very day the order was filed in San Francisco, January 3, in demonstration of its good faith, entered an order vacating its October 6th restraining order and directed Joan Cobell to deliver custody of the children to

Henry Cobell. Within a week Henry picked up the children and took them to Billings, Montana. Joan and Henry subsequently took part in state court proceedings to determine final custody of the children.

The issues presented by the appellants on appeal to the United States Court of Appeals for the Ninth Circuit were:

1. The trial court erred in refusing to dismiss the petition for the writ of habeas corpus on the ground that petitioners failed to exhaust available tribal court remedies.

2. The trial court erred in holding that the tribal court must enforce the judgments and interlocutory decrees of state courts.

3. The trial court erred in holding that the tribal court procedures employed

in this case violated petitioner's federally protected rights; and, alternatively, if the tribal court procedures did violate Henry's rights, the court improperly granted an unconditional writ of habeas corpus.

4. This controversy is not moot, even though the Cobell Children are not presently on the Blackfeet Reservation, and so are not now within the jurisdiction of the tribal court.

The Court of Appeals, in its opinion filed September 5, 1974, (reported at 503 F.2d 790 (1974)) affirmed the judgment of the District Court. It found:

(1) That exhaustion of tribal remedies was not an inflexible requirement, and in this case exhaustion was not practical since it appeared that Henry

Cobell lacked meaningful remedy in the Tribal Court.

(2) That the controversy was not moot since the underlying conflict between the Tribal Court and the state courts still existed.

(3) That the October 6, 1972 order of the Tribal Court was unlawful because the Tribal Court was without jurisdiction; the Blackfeet Tribe had "relinquished" jurisdiction over marriage, divorce, and adoption by way of provisions in Chapter 3 of the Blackfeet Tribal Law and Order Code and that this relinquishment encompassed a surrender of jurisdiction over custody determinations incident to divorce.

Subsequently, on November 4, 1974, the Court of Appeals granted the motion of appellants Blackfeet Tribal Court and

Judge Sharp for extension of time for filing a petition for rehearing. The petition for rehearing, which urged that the Court of Appeals had overlooked this Court's decision in Kennerly v. District Court, 400 U.S. 423 (1971) in finding a relinquishment of jurisdiction, was denied without opinion by the same order.

REASONS FOR GRANTING THE WRIT

As the court below recognized this case involves the conflicting jurisdictional claims of the Montana state courts and the Blackfeet Tribal Court. The decisions of the District Court and the Court of Appeals are inconsistent with: (1) United States Constitution which recognizes the inherent sovereignity of Indian tribes, (2) the Indian Civil Rights Act by which Congress attempted to balance the personal rights of individual Indians

with the tribe's right of self-government, (3) several decisions of this court, namely Williams v. Lee, 358 U.S. 217 (1959) Kennerly v. District Court, 400 U.S. 423 (1971) which uphold the Indian right to self-government, and (4) decision of other federal courts, particularly O'Neal v. Cheyenne River Sioux Tribe, 482 F.2d 1140 (8th Cir. 1973), requiring exhaustion of tribal court remedies.

This Court should grant the Writ of Certiorari in this case in order to resolve crucial conflicts in the interpretation and application of the Indian Civil Rights Act and to resolve the continuing and expanding conflict between state governments and tribal governments concerning jurisdiction over events occurring on Indian Reservations. This case presents conflicts typical of those coming

before state and federal courts with increasing regularity, but with totally inconsistent resolutions.

ARGUMENT

I

THE COURT OF APPEALS ERRED IN HOLDING THAT EXHAUSTION OF TRIBAL COURT REMEDIES WAS NOT REQUIRED IN THIS CASE.

In Ex Parte Hawk, 321 U.S. 114 (1944) this Court established the "exhaustion doctrine" which requires one detained under a state court judgment to exhaust all state remedies before seeking relief in federal courts. Congress, in enacting 28 U.S.C. 2254 gave its approval to the "exhaustion doctrine." This doctrine has been extended to military prisoners, Gusik v. Schilder, 340 U.S. 128 (1952), federal prisoners, Williams v. U.S., 431 F.2d 873 (5th Cir. 1970) and to aliens being deported, Ex parte Lee Fong Fook,

74 F. Supp. 68,(N.D. Calif. 1948). There seems to be no reason why the exhaustion doctrine should not also apply to those in custody under Indian Tribal Court judgments. Indeed there are compelling reasons why an exhaustion requirement should be applied to suits brought under the Indian Bill of Rights, 25 U.S.C. § 1302. As the Eighth Circuit emphasized in O'Neal v. Cheyenne River Sioux Tribe, 482 F.2d 1140, 1146 (8th Cir. 1973)

> "[t]he adoption of the Indian Bill of Rights was not meant to detract from the generally recognized policy, stated in the Williams case, of preserving the 'authority of tribal courts.'"

The O'Neal court concluded that an exhaustion requirement was supported by the Indian Civil Rights Act itself, as well

as by this Court's decision in Williams v. Lee, 358 U.S. 217 (1959).

The court below did not disagree with O'Neal but applied the exhaustion doctrine in a way which ignored the policies behind such a requirement as well as the undisputed facts in this case. Its finding that exhaustion was not required in this case was based on the fact that the tribal judge indicated that he would not have rescinded his order. Assuming arguendo that the tribal judge indicated that he would not have been persuaded to rescind his order and that this fact makes further relief from the tribal court "unavailable", the undisputed fact remains that the Blackfeet Law and Order Code establishes a Blackfeet Appellate Court with jurisdiction to hear appeal from judgments and decrees issued by any of the tribal judges.

Thus Henry Cobell, petitioner below, had a right to appeal the tribal court's order to the Blackfeet Appellate Court and his failure to do so constitutes a deliberate bypassing of available tribal court remedies. The petition for federal habeas corpus should have been denied on this basis alone.

II

IN THE ABSENCE OF AN EFFECTIVE TRANSFER OF JURISDICTION OVER CUSTODY MATTERS TO THE STATE OF MONTANA, THE COURTS BELOW ERRED IN HOLDING THAT THE BLACKFEET TRIBAL COURT COULD NOT, IN THE ABSENCE OF A SPECIFIC GRANT OF AUTHORITY FROM CONGRESS, DECLINE TO HONOR THE DECREE OF THE STATE COURT.

A.

IN THE ABSENCE OF A GOVERNING ACT OF CONGRESS A TRIBAL COURT NEED NOT ENFORCE A JUDGMENT OR DECREE FROM A STATE COURT.

In its opinion of December 15, 1972, the District Court recognized that under the holdings of this Court from Worcester v. Georgia, 31 U.S. 515 (1832) to

Williams v. Lee, supra, Indian Tribes and their tribal courts possess sovereign powers except as limited by treaties and Acts of Congress. Thus it is well established that Indian Tribes require no specific grant of authority from Congress to act in matters essential to tribal self-government. The District Court misapplied this principle and held that the Tribal Court's order was unlawful in the absence of a specific grant from Congress because the matter involved here was not essential to tribal self-goverment. However, it can hardly be denied that the welfare of Indian children on an Indian Reservation is a matter essential to tribal self-government. Thus, the court below should have held that the Tribal Court order would be valid unless prohibited by an Act of Congress. As no Act of Congress

prohibits the Blackfeet Tribal Court from entering decress affecting the custody of Blackfeet Indian children within the Blackfeet Indian Reservation nor requires tribal courts to give full faith and credit to state court judgments, the Tribal Court decree should have been upheld.

B.

THE HOLDING THAT THE POWER TO MAKE A CUSTODY DETERMINATION IS NOT A MATTER ESSENTIAL TO TRIBAL SELF-GOVERNMENT ESTABLISHES A PRECEDENT WHICH DANGEROUSLY UNDERMINES DECISIONS OF THIS COURT REGARDING TRIBAL SOVEREIGNTY.

Indian Tribes are recognized as sovereign by the Constitution of the United States. Article I, Section 8, clause 3 provides that Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian Tribes.

This Court has acknowledged the sovereignty of Indian Tribes, Worcester v.

Georgia, 31 U.S. (6 Pet.) 515 (1832), and has defined that sovereignty as extending to all matters essential to tribal self-government. Williams v. Lee, supra. It has protected that sovereignty by holding that a state may not acquire jurisdiction regarding matters essential to tribal self-government except by complying with the requirements of the governing Acts of Congress. Kennerly v. District Court, 400 U.S. 423 (1971).

Although this Court has not established guidelines regarding what are matters essential to tribal self-government, it seems beyond question that the power to exercise custody over the minor children of tribal members, present on the reservation, to prevent foreseeable harm to the children, is a power essential to tribal self-government. Under the

doctrine of parens patriae, such a power is one of the traditional standards of internal sovereignty, and it has never been held by this Court that the Full Faith and Credit Clause applies to child custody decrees issued by states. See Justice Frankfurter's concurring opinion in May v. Anderson, 345 U.S. 528, 536 (1953).

In view of the fact that the challenged tribal power seems almost certainly to be one essential to tribal self-government, it becomes clear that it was the conflict with the decreee of the Montana state court that prompted the courts below to hold that a specific grant of authority was required to validate the Tribal Court order. If internal tribal sovereignty is to mean anything, there will be times when it conflicts with

state sovereignty. The mere existence of such a conflict cannot be the basis for limiting tribal authority unless the concept of Indian self-determination is to be abandoned.

C.

IN LIGHT OF THIS COURT'S HOLDING IN KENNERLY v. DISTRICT COURT, IT WAS ERROR FOR THE COURT OF APPEALS TO HOLD THAT THE BLACKFEET TRIBE COULD IN ABSENCE OF COMPLIANCE BY THE STATE OR BY THE TRIBE WITH GOVERNING ACTS OF CONGRESS, RELINQUISH TO THE STATE OF MONTANA JURISDICTION OVER MARRIAGE, DIVORCE, ADOPTION, AND CHILD CUSTODY DETERMINATIONS.

Affirming the District Court's holding that the Tribal Court's order of October 6, 1972 was unlawful, the Court of Appeals held that through the Blackfeet Tribal Law and Order Code, the Blackfeet Tribe had relinquished jurisdiction over marriage, divorce, and adoption to the state of Montana, and that this relinquishment encompassed a surrender of

jurisdiction over custody determinations incident to divorce actions.

The Blackfeet Tribe is a federally recognized Indian Tribe organized and incorporated under the Wheeler-Howard Act (48 Stat. 986, 25 U.S.C. §461 et seq.). The Tribe adopted a Constitution under this Act which was approved by the Secretary of the Interior on December 13, 1935 and has been amended at various times since then.

There is no question that at the time the Blackfeet Constitution was approved, the Tribe had jurisdiction over marriage, divorce, adoption, and custody determinations incident to divorce when the proceedings involved Tribal Members. The Wheeler-Howard Act (25 U.S.C. §476), provides that any tribe organizing under the Act shall have all the powers vested

in any Indian Tribe by existing law. In addition, the Tribal Constitution provided that jurisdiction should extend to all Tribal members. Blackfeet Constitution, Art. VI, Section 1(k). The question is whether the Tribal Law and Order Code, which was enacted subsequent to the adoption of the Tribal Constitution, may, in light of the Kennerly decision, be held to have transferred such jurisdiction to the state of Montana.

The pertinent provisions of the Law and Order Code are found in Chapter 3, entitled "Domestic Relations." They are Sections 1 and 2 and provide as follows:

Sec. 1 Marriages

> All members of the Blackfeet Indian Tribe shall hereafter be governed by State Law and subject to State jurisdiction with respect to marriage

hereafter consummated. Common law marriages and Indian custom marriages shall not be recognized within the Blackfeet Reservation.

Sec. 2 Divorces

All divorces must be consummated in accordance with the State Law of Montana. Indian custom divorces are from this time on illegal and will not be recognized as lawful on the Blackfeet Reservation.

It is doubtful that the intent of the Tribe was to relinquish any jurisdiction by these provisions, but in any event it is indisputable that the provisions could not, under Kennerly, transfer any jurisdiction to the state unless and until the State of Montana complied with existing federal law.

Before the Court in Kennerly was the

very same Blackfeet Tribal Law and Order Code involved here. This Court held in Kennerly that provisions in Chapter 2 of the Code could not suffice to transfer jurisdiction over civil matters because neither the Tribe nor the State of Montana had complied with the requirements of either of the Acts of Congress governing the transfer of jurisdiction from Indian Tribes to states.

Kennerly is directly in point here. The governing Acts of Congress are the same two which were in effect when Kennerly was decided: Public Law 280, 67 Stat. 588 and the 1968 Civil Rights Act, 82 Stat. 77 (25 U.S.C. §1322). The requirements of neither were complied with to transfer jurisdiction over marriage, divorce, and custody determinations incident to divorce from the Tribe to the

State of Montana. Therefore, it is submitted that there could not have been any transfer of such jurisdiction from the Blackfeet Tribe to the State and that it was error on the part of the Court of Appeals to so hold.

CONCLUSION

The holdings of the Court of Appeals undermine the concept of Tribal sovereignty which has been consistently upheld by this Court. The holding that there may be a transfer of jurisdiction from the Blackfeet Tribe to the State of Montana in the absence of compliance with governing Acts of Congress is directly in conflict with this Court'd decision in the Kennerly case. For these reasons, it is

respectfully submitted that the Writ of Certiorari be granted.

Respectfully submitted,

JOHN T. McDERMOTT
University of Montana
School of Law
Missoula, Montana 59801

Counsel for Petitioners

January 31, 1975